DATO' ABDULLAH HISHAN HJ MOHD HASHIM

v.

SHARMA KUMARI SHUKLA

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-594-1997]
19 MARCH 1999

CIVIL PROCEDURE: *Res judicata - Estoppel - Issue estoppel - Whether can be raised by court if not pleaded - Whether prevents parties from reasserting a cause of action or issue which should have been brought forward but was not - Whether defendant should have raised issue of illegality in earlier application to strike out plaintiff's statement of claim - Whether defendant should be allowed to raise same issue in subsequent application to strike out plaintiff's amended statement of claim*

CONTRACT: *Illegality - Promise to marry - Whether illegal - Contracts Act 1950, ss. 24(a), (b), (e) - Promise made by married non-Muslim woman to Muslim man - Whether illegal under ss. 32 & 34 of Syariah Criminal Offences (Selangor) Enactment 1995 - Whether contrary to public policy - Whether breach of promise to marry actionable*

By his writ and statement of claim, the plaintiff alleged that he had given a loan of RM262,350 to the defendant to enable her to purchase 167,000 shares in Insas Bhd ('the shares'), which loan was given in consideration of the defendant's promise to marry the plaintiff. It was alleged that the defendant had agreed to transfer 50% of the shares to the plaintiff but would retain the balance and not dispose of the same without the consent of the plaintiff so long as the defendant worked at Glamoir World of Sports Sdn Bhd ('Glamoir') and continued with their private relationship. Subsequently, the defendant disposed of some of the shares without the consent of the plaintiff and thereafter ceased employment at Glamoir. It was further alleged that the defendant had orally agreed to return the sum of RM131,140 to the plaintiff together with the profits from the sale of the shares amounting to RM20,000.

The defendant applied to strike out the plaintiff's statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC'). The Deputy Registrar dismissed her application and the defendant appealed to the judge in chambers. Meanwhile the plaintiff's application to amend his statement of claim to include, *inter alia*, an averment that the defendant had agreed to embrace Islam and thereafter marry the plaintiff, was allowed by the

court as the defendant had consented to the amendment. Thereafter, the defendant withdrew her appeal against the Deputy Registrar's decision, filed and served her amended defence, and proceeded to file the instant application to strike out the plaintiff's amended statement of claim under O. 18 r. 19(1)(a) of the RHC. It was submitted that the consideration moving from the defendant, *ie*, to divorce her husband and marry the plaintiff, was illegal pursuant to s. 24(a) or (b) or (e) of the Contracts Act 1950 ('the Act') and ss. 32 and 34 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('the Enactment').

Held:

[1] On grounds of public policy, the court may raise the issue of *res judicata* and issue estoppel even if it is not pleaded. Cause of action estoppel prevents the reassertion of a cause of action which has been determined with finality by the parties. Issue estoppel prevents the contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Issue estoppel will also prevent the parties from reasserting a cause of action or issue which should have been brought forward but was not, whether deliberately or inadvertently. The defendant ought to have raised the issue of illegality in her earlier application to strike out the plaintiff's original statement of claim. She ought to have applied to stay the hearing of the plaintiff's application to amend his statement of claim and proceeded with her appeal against the Deputy Registrar's decision. On this ground alone, the defendant's instant application to strike out the plaintiff's amended statement of claim should be dismissed.

[2] Under s. 24(a) of the Act, an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an **act** forbidden by law. Thus, a contract is void for illegality only if a statute prohibits the **act** which the parties have contracted to do. In this case, there was no statute which prevented a marriage between the plaintiff and the defendant as the defendant was willing to convert to Islam.

[3] As the defendant had elected to rely solely on O. 18 r. 19(1)(a) of the RHC, there was no evidence in respect of the ingredients in ss. 32 and s. 34 of the Enactment which the defendant sought to rely upon.

[4] Since the defendant had agreed to convert to Islam and was aware of the plaintiff's religion which allowed him to marry more than one wife, her argument that the agreement to marry the plaintiff was contrary to public policy must fail.

[Defendant's application to strike out amended statement of claim dismissed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(foll)***

Nafsiah v. Abdul Majid [1969] 2 MLJ 175 ***(foll)***

Ooi Kiah Inn Charles & Anor v. Kukuh Maju Industries Sdn Bhd [1993] 3 CLJ 199 ***(dist)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 ***(dist)***

Spiers v. Hunt [1908] 1 KB 720 ***(dist)***

Legislation referred to:

Contracts Act 1950, ss. 24(a), (b), (e), 25

Rules of the High Court 1980, O. 18 r. 19(1), O. 33 r. 2

Syariah Criminal Offences (Selangor) Enactment 1995, ss. 1(2), 32, 34

For the plaintiff - Karpal Singh (M Manoharan & WW Cheong with him); M/s Karpal Singh & Co

For the defendant - Ahmad Moosdeen; M/s Chan, Moosdeen & Partners

Reported by Farah Naim

JUDGMENT

RK Nathan J:

The Pre-Amended Statement Of Claim

The plaintiff by this writ and statement of claim contended that he had loaned the defendant a sum of RM262,350 to enable her to purchase a total of 167,000 Insas shares sometime in August 1996. The plaintiff contended that this loan was given in consideration of the defendant's promise made on 2 March 1996 that she would marry the plaintiff at the Crown Princess Hotel. The plaintiff also pleaded that the defendant had agreed to transfer 50% of the said shares to the plaintiff and that both parties had also mutually agreed that the defendant would retain the balance as a form of security so long as the defendant worked at Glamoir World of Sports Sdn Bhd (Glamoir) and so long as the private relationship between the plaintiff and the defendant continued. The defendant was also not to sell or transfer the 50% of the shares in her possession to anyone without the consent and approval of the plaintiff. However on 3 December 1997 the defendant

informed the plaintiff over the telephone that she had ceased employment at Glamoir. She also agreed orally to return the sum of RM131,140 and also agreed to refund to the plaintiff the profits accrued amounting to RM20,000 after she had, without the consent of the plaintiff, sold 10,000 of the said shares on 25 February 1997 and a further 10,000 shares on 26 February 1997. In the circumstances the plaintiff made various claims.

Chronology Of Events

The plaintiff filed this writ and statement of claim on 23 January 1998. Upon being served, the defendant applied on 19 June 1998 to strike out the plaintiff's statement of claim (encl. 28) under O. 18 r. 19 of the Rules of the High Court 1980 (the RHC). On 20 August 1998 the Deputy Registrar heard the said application and dismissed the same with costs.

On 25 August 1998, the defendant filed a notice of appeal to the judge in chambers (encl. 50). In the meantime, the plaintiff filed an application (encl. 39) to amend the statement of claim and this application was heard on 23 September 1998. Since the defendant consented to the said application an order in terms was granted. On 1 October 1998 when encl. 50 which was the appeal against the decision to strike out, came up for hearing before me, the defendant withdrew her appeal. The plaintiff therefore then filed and served the amended statement of claim.

The Amended Statement Of Claim

In the said amended statement of claim the plaintiff included *inter alia* the averment that the defendant agreed to embrace Islam and that thereafter she would marry the plaintiff on a date to be fixed. Having filed and served her amended defence the defendant then proceeded to file the present application to strike out the writ under O. 18 r. 19(1)(a) of the RHC (encl. 74).

The 2nd Application To Strike Out The Claim

Although the defendant filed an affidavit in support, she conceded in her submission that I ought to ignore the said affidavit since her present application to strike out the amended statement of claim was solely based on sub-r. (1)(a) which meant that I ought to rely only on matters pleaded in the statement of claim to see if there was or was not a cause of action. The defendant's application is premised on the ground that the consideration moving from the defendant, that she would divorce her husband and marry the plaintiff was illegal pursuant to s. 24(a) or (b) or (e) of the Contracts Act 1950.

The said sub-sections read as follows:

> 24. The consideration or object of an agreement is lawful, unless –
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> ...
>
> (e) the court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Findings Of The Court

Res judicata And Issue Estoppel

In *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 the then Supreme Court very aptly explained *res judicata* and issue estoppel. It explained that when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the *res judicata*, as the judgment becomes the truth between such parties and an estoppel *per rem judicatum* has been created as a result. The Supreme Court went on to explain that there are two kinds of estoppel *per rem judicatum*, that is, cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined with finality by the parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. What is more interesting and relevant to the case before me is that the Supreme Court went on to hold that issue estoppel would prevent parties from reasserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently. It also concluded that on grounds of public policy which sought to ensure finality to litigation, this court could raise the issue of *res judicata* and issue estoppel, even if it was not pleaded.

The statement of claim shows that the promise of marriage by the defendant was clearly pleaded in the unamended statement of claim and which the defendant applied to strike off and which application was dismissed with costs. Clearly the defendant ought to have raised this issue of illegality in that application to strike out. There is no explanation

proffered why she did not do that. However, neither inadvertence nor a deliberate act of omission to raise that issue can now give protection to the defendant in respect of this application. The plaintiff had applied to amend the statement of claim. Instead of consenting to this application to amend, the defendant ought to have applied to stay the hearing of that application and ought to have proceeded with the appeal before me against the deputy registrar's dismissal of her application to strike out the statement of claim. This course of conduct seems all the more pertinent considering the defendant's submission that since she had consented to the application to amend, her continuation of the appeal would be futile and purely academic. The defendant had missed her opportunity and cannot now by this second application try for a second bite at the cherry. On this ground alone, this application to strike out the amended statement of claim ought to be dismissed. However, since the defendant has raised illegality I will also consider this issue.

Is The Consideration To Marry The Plaintiff Illegal?

The defendant argued that since in consideration of the loan of RM262,350 she had promised to marry the plaintiff, therefore in order to carry out her promise to marry the plaintiff by January 1998, she would have to divorce her husband by the end of 1997 and embrace Islam. It was the contention of the defendant that since she would have to divorce her husband in order to keep her promise to marry the plaintiff, and since the plaintiff knew that she was already married and since the plaintiff accepted such a promise, the plaintiff's claim being thus based on an agreement that was illegal and against public policy, is therefore void and unenforceable.

The defendant relied heavily on the Federal Court's decision in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151. In that case the Sandakan Turf Club was given a licence to operate certain lotteries under the local Sabah Gaming Ordinance. The club entered into an agreement with the plaintiff/appellant to allow the appellant to operate the lotteries. Subsequently, the Sabah Gaming Ordinance was repealed and the Federal law governing gaming applied to Sabah. Following from this the first licence was cancelled and the Federal Gaming Authority issued a new licence to the club. A dispute arose between the club and the appellant as to whether this agreement allowed the appellant to continue to operate the lotteries under the new licence. The two issues raised were whether there was an implied term in the agreement to allow the appellant to continue to operate the lotteries under the new licence and whether the agreement was in breach of a condition in the new licence and therefore illegal and unenforceable. The condition was that the licence could not be assigned and the question was whether the agreement was an assignment.

The High Court decided for the appellant. The Court of Appeal reversed the decision and held that there was no implied term and held that the agreement was illegal under s. 24(b). The Federal Court dismissed the appeal. Two of the three Federal Court judges held that there was an implied term, but all three held that the agreement was illegal under s. 24(a) as it breached the condition not to assign.

In giving the main judgment Peh Swee Chin FCJ said at p. 176 as follows:

> ... Thus, under s. 24(a) aforesaid, an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law. ... It is illegal and unenforceable under s. 24(a) aforesaid because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute.

The defendant also relied on s. 25 of the Act which states that "If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."

Syariah Criminal Offences (Selangor) Enactment 1995

The defendant referred me to the following sections of the Enactment to show that the promise of the defendant to marry the plaintiff is forbidden by law:

> 1.(2) This Enactment shall apply to Muslims only.

> 32. Any person who entices a married woman or takes her away from or in any other manner influences her to leave the matrimonial home determined by her husband shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and the court shall order the married woman to return to her husband.

> 34. Any person who instigates, forces or persuades any married man or woman to be divorced or to neglect his or her duties or responsibilities to his or her spouse or family shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

The defendant argued that since the amended statement of claim clearly pleaded that the defendant had promised to divorce her husband to marry the plaintiff, in consideration of which the plaintiff gave the loan, this meant that the plaintiff was enticing a married woman or influencing her to leave her matrimonial home (in breach of s. 32) and was instigating or persuading the defendant to divorce her husband (in breach of s. 34). It

was submitted that the plaintiff was caught by his own pleadings and falling in line with the decision in *Sababumi* I was urged to hold such an agreement, illegal, void and therefore unenforceable.

In answer to Mr. Karpal Singh's contention that the defendant is presuming the plaintiff to be guilty under the Enactment even before any charge under the said Enactment had been laid against the plaintiff, let alone being found guilty, the defendant referred me to a decision of the then Supreme Court in *Ooi Kiah Inn Charles & Anor v. Kukuh Maju Industries Sdn Bhd* [1993] 3 CLJ 199; [1993] 2 MLJ 224. In that case the defence was that the consideration for the agreements was illegal and/or against public policy as it required the plaintiff to withdraw his police report of cheating by the defendant. The High Court found for the plaintiff. However the then Supreme Court reversed the decision on the ground that the agreements were against public policy as they were intended to stifle prosecution. As to the precise point raised by Mr. Karpal Singh, that is, whether it was necessary for the police to charge the party for any offence before the issue of illegality could be raised, Peh Swee Chin SCJ said at p. 232 of *Kukuh Maju* as follows:

> We also share the same view expressed to the effect in *Kamini (Kamini Kumar Basu v. Birendra Nath Basu* AIR [1930] PC 100) that a pending prosecution need not at all be a prerequisite for impugning such an agreement to stifle prosecution and we did not find therefore the contrary view of the learned trial judge acceptable.
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> It is of course envisaged that, more often than not, such impugned object or consideration is not stated in the agreement expressly, but sometimes a necessary inference can be drawn from the evidence, it will then be sufficient. Thus a pending prosecution in court could lend weight to the inference sought to be established. A pending prosecution is a mere matter of weight of evidence.

In so far as the defendant would rely on the decision in *Kukuh Maju* I am of the view that that case cannot be applied to the facts of this case. In *Kukuh Maju* the consideration was that the plaintiff would withdraw a police report already lodged and this clearly fell into the category of the well-known defence of "an agreement to stifle prosecution" which the Supreme Court held was against public policy as it could lead to abuse. But that is not the case here. There has been no report or pending prosecution in this case before me. Further, it is necessary that I draw to my attention a relevant passage of Peh Swee Chin SCJ at p. 232 which reads as follows:

> It is to be emphasised that for Malaysia and as in India it is only when the stifling of prosecution relates to non-compoundable offences as specified in our Penal Code (FMS Cap 45), that our courts consider such agreements as void for being unlawful under s. 24 of the Act. When they refer to compoundable offences or offences which are compoundable with the leave of the court, such contracts would not be void and would then be indeed encouraged by the courts as stated by the learned trial judge.

There is no evidence before me as to whether the offences referred to by the defendant in relation to the Enactment, are compoundable or not.

There is one other important issue I must consider in respect of ss. 32 and 34 of the Enactment. To my mind the relevant ingredients in respect of s. 32 are that there must be evidence of enticement of the defendant by the plaintiff or that he has taken her away, or in any other manner he had influenced her to leave the matrimonial home determined by her husband. The defendant elected to only rely on O. 18 r. 19(1)(a) which meant that the defendant's case was only confined to matters pleaded in the statement of claim. I find no evidence in the statement of claim that the plaintiff had enticed the defendant or that he had taken her away or that he had influenced her to leave the matrimonial home determined by her husband. Perhaps the defendant ought to have relied on O. 18 r. 19(1)(b), (c) or (d) which would have entitled her to rely on affidavit evidence. But then again why didn't she. Is it possible that the plaintiff would have been able to rebut all such allegations by his own affidavit. This court will never know.

The same argument must apply to s. 34 of the Enactment. I find that the main ingredients to this section are that there must be evidence that the plaintiff instigated, or forced or persuaded the defendant to be divorced or to neglect her duties to her husband and family. There is no such evidence or even averments before me. Therefore even on these grounds I find that the defendant's reliance on the Enactment to launch this application, must fail.

Another issue I ought to consider is whether the Enactment applies to the defendant since s. 1 says that this Enactment shall apply to Muslims only. It is clear therefore that all these issues have to be argued out and evidence led, including possible expert evidence, with regard to a case of a Muslim and a non-Muslim, before a final decision could be arrived at. Therefore, I hold that this application to summarily strike out this writ and statement of claim, is, in itself, an abuse of process.

There is an interesting passage to be found in *Sababumi* at p. 176. It reads:

> To decide if s. 24(a) makes a contract illegal and unenforceable in connection with a statute, and this bears repeating, one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question, and *not* whether the statute prohibits the contract or the making of the contract in question by the parties. This difference is real, though very subtle. In my view, the failure to bear in mind this fine distinction has given rise to some difficulties.

Herein lies the answer to this application. It is plain therefore that what the Federal Court meant was that the contract is only void for illegality if the statute prohibits **the act** (emphasis provided) which the parties have contracted to do. As I can see there is no statute that prevents this marriage between the plaintiff and the defendant, since the defendant was willing to convert to Islam. *Sababumi* did not decide that the making of a contract to marry is illegal. In any case even the Enactment relied on by the defendant does not prevent this marriage. Therefore the reliance by the defendant on *Sababumi* is flawed.

Public Policy

The defendant next relied on public policy. She contended that her agreement to marry the plaintiff whilst she was legally married to her husband was against public policy and the defendant relied on a line of cases to support her argument. She referred me, amongst others, to *Spiers v. Hunt* [1908] 1 KB 720. In that case, the defendant who was to the knowledge of the plaintiff a married man, promised to marry the plaintiff on the death of his wife. He did so with the intention, known to the plaintiff, of inducing her to commit adultery with him, and she did so after the promise and before the death of the defendant's wife. When the defendant refused to marry the plaintiff she commenced an action for breach of promise of marriage. The court held that such a promise as was made by the husband was contrary to public policy and could not be enforced.

The short answer to this plea of "contrary to public policy" is to be found in *Nafsiah v. Abdul Majid* [1969] 2 MLJ 175. The plaintiff in this case sued the defendant for breach of promise of marriage contending that she had been seduced by the defendant. The court there held that the plaintiff's knowledge that the defendant was already married did not invalidate the promise as the defendant was, under his own personal law, entitled to more than one wife. In the present case, since the defendant had agreed to convert to Islam before she could marry the plaintiff obviously she must be aware of the plaintiff's personal law. The submission of "contrary to public policy" must perforce fail.

There is no question of the promise being immoral since the personal law of the plaintiff allows the taking of more than one wife. In any case, there is no evidence before me at all that the plaintiff is a married man.

Clearly to my mind there are issues in this case that can only be resolved upon a full trial. There is no place here even for an application under O. 33 r. 2 of the RHC 1980 which allows for the sole determination of a point of law to resolve the case. This application therefore stands dismissed with costs.